(1)

No. 85-1613

In the Supreme Court of the United States

OCTOBER TERM, 1986

UNITED STATES OF AMERICA, PETITIONER

v.

JOHN DOE, INC., I, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

CHARLES FRIED
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

10pp

TABLE OF AUTHORITIES

In the Supreme Court of the United States

OCTOBER TERM, 1986

No. 85-1613

UNITED STATES OF AMERICA, PETITIONER

v.

JOHN DOE, INC., I, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

The primary issue in this case is whether Department of Justice attorneys who conducted a grand jury investigation into possible criminal violations of the antitrust laws may, after termination of the grand jury, review their own memoranda, the transcripts committed to their custody (see Fed. R. Crim. P. 6(e)(1)), and other grand jury materials in preparing for and litigating a related civil case, without first obtaining a court order pursuant to Rule 6(e). The court of appeals acknowledged that it seemed "fictional" to treat such review as a "disclosure" requiring a court order and that the threat of "affirmative mischief" seemed "minimal," but it felt obliged to prohibit such review by what it thought was the "reluctance imposed on us from above." Pet. App. 12a, 16a-17a.

We demonstrated in our opening brief that the court of appeals' skepticism was well-founded. Rule 6(e) draws a line between different *people*, not between an "attorney for the government" and the sources of refreshment of his recollection. Neither the plain language of Rule 6(e) nor

the purposes served by grand jury secrecy—facilitating the investigation and prosecution of crime, protecting the innocent, and preventing misuse of the grand jury—require that a government attorney seek a court order when he is not making any disclosure of "matters occurring before the grand jury" to any other person. No purpose would be served by requiring attorneys on the "prosecution team" to present to a district court in each case the threshold question whether they may participate in a related civil case and may review their own memoranda and other grand jury materials in doing so.[1] The only practical consequence of such an unjustified extension of the meaning of

[1] Respondents assert (Resp. Br. 8-9) that the government does not "own" grand jury materials and that it wrongfully refused to return them in this case. The first assertion is misleading, and the second is false. The most important document that the government attorney will want to review will usually be the lengthy memorandum, prepared by the prosecution team, which summarizes the evidence presented to the grand jury and analyzes the law and other considerations. That "prosecution memorandum" is no doubt "government property," but we fully agree that the members of the prosecution team may not disclose it to *other* people without a Rule 6(e) order. Other important documents are the transcripts of the grand jury's proceedings. "Ownership" of these documents is a moot point: Rule 6(e)(1) expressly provides that the government attorney shall keep them in his custody or control unless the court orders otherwise. Finally, subpoenaed pre-existing documents (which may not be subject to Rule 6(e) at all unless their disclosure would reveal the workings of the grand jury, see, *e.g.*, *SEC* v. *Dresser Industries, Inc.*, 628 F.2d 1368, 1382-1383 (D.C. Cir.), cert. denied, 449 U.S. 993 (1980); *United States* v. *Interstate Dress Carriers, Inc.*, 280 F.2d 52, 54 (2d Cir. 1960)), certainly belong to whoever provided them. Here, the government did not wrongfully retain any documents: some documents were returned; only one of the eight respondents requested the return of additional documents, and (in view of the pending civil investigation and the outstanding CIDs) the Antitrust Division and that respondent entered into a mutually satisfactory arrangement for the return of some documents and the copying of others. In sum, the question of ownership has nothing to do with the issues in this case.

"disclosure" would be to force double staffing of cases with a consequent reduction in law enforcement. U.S. Br. 22-37.

A. Respondents and their amici, Archer-Daniels-Midland Company and Nabisco (ADM) assert, without enthusiasm, that (1) review of grand jury materials by attorneys on the prosecution team *is* disclosure. Their principal arguments, however, are that (2) permitting review of grand jury materials by the members of the prosecution team will inevitably lead to unlawful disclosure to other people of "matters occurring before the grand jury"; (3) Rule 6(e) prohibits the review of grand jury materials in connection with a civil case even if there is no disclosure; (4) it is unfair for the government to have access to information that is not automatically available to a civil defendant; and (5) in any event, the question whether an attorney on the prosecution team should be permitted to participate in a subsequent civil case and review grand jury materials should be resolved in each case by a district judge. None of these contentions has merit.

1. It would do substantial violence to the English language to say that a government attorney's continued access, during the civil phase of a dispute, to grand jury material with which he is already familiar constitutes "disclosure" of that material. Since no legislative history counsels otherwise, the rule must be "accept[ed] * * * as meaning what it says" (*Schiavone* v. *Fortune*, No. 84-1839 (June 18, 1986), slip op. 9). Respondents offer no serious argument that such continued access constitutes "disclosure" except (Resp. Br. 18) to misconstrue one remark of the Ninth Circuit as quoted by this Court in *United States* v. *Sells Engineering, Inc.*, 463 U.S. 415, 422 n.6 (1983). As we explained in our opening brief (U.S. Br. 25 n.19), the Ninth Circuit's only point was that a challenge to an improper transfer of materials to a *new* person does not become moot the moment the transfer is made, because the new person's continuing review enlarges the amount of improperly gained knowledge. By contrast, the

prosecutor's continuing access does not tell any person anything Rule 6 did not permit him to know in the first place.

2. Respondents contend (Resp. Br. 13-17) that if attorneys on the prosecution team are permitted to review grand jury materials in connection with a civil case their further actions,[2] including the filing of a civil complaint, will inevitably disclose "matters occurring before the grand jury" to other people. This argument has serious implications, because (as ADM notes (ADM Br. 11)), it applies equally to the use of unrefreshed recollections and suggests that there ought to be a flat prohibition on any participation by attorneys on the prosecution team in the civil case. The argument is, however, without merit.

Respondents are not entitled to suppress information about their conduct merely because a grand jury investigated it: the purpose of grand jury secrecy is to prevent disclosure of the workings of the grand jury itself, not to conceal any information the grand jury happens to have considered. See *United States* v. *Interstate Dress Carriers, Inc.*, 280 F.2d 52, 54 (2d Cir. 1960). A complaint need not, and the court of appeals rightly held that the complaint in this case did not, disclose "matters occurring before the grand jury" (Pet. App. 17a). To the contrary, as the court of appeals pointed out, the "complaint * * * does not quote from or refer to any grand jury transcripts or documents subpoenaed by the grand jury, and does not

[2] The court of appeals was not troubled by the risk that continued access by the attorneys themselves would lead to an improper disclosure. The court's concern (Pet. App. 15a-16a), echoed without elaboration by respondents (Resp. Br. 20), was that grand jury materials may be disclosed to secretaries and paralegals working with the attorneys and that such support personnel may, in turn, disclose such materials to others. But, first, we demonstrated in our opening brief that support personnel are properly considered extensions of the attorney (see U.S. Br. 31-33). Second, disclosure *by* such personnel (of which there is no evidence in this case) is no more likely in this context than in a criminal prosecution and would be punishable as contempt.

mention any witnesses before the grand jury or even refer to the existence of a grand jury" (Pet. App. 5a). The court of appeals therefore properly rejected (*id.* at 17a) respondents' contention (Resp. Br. 13-14) that filing the complaint violated Rule 6(e), and respondents did not seek review of that ruling in this Court.[3]

The same fundamental point answers respondents' contention (Resp. Br. 15-18) that continued access would inevitably lead to disclosure in discovery or trial. The mere fact that the government attorney has a refreshed (or unrefreshed) recollection of the grand jury investigation as he frames civil discovery requests, confers with witnesses, or poses questions at trial, does not mean that he is by those actions disclosing the existence or workings of the grand jury. Should the government find that it must disclose matters occurring before the grand jury to conduct discovery or meet its burden of proof at trial, the government will seek a Rule 6(e) order at that time. The government has unequivocally acknowledged its obligation to seek and obtain a Rule 6(e) order before using any grand jury materials in a civil case in a manner that would disclose the workings of the grand jury. See U.S. Br. 18; U.S. C.A. Br. 33.[4]

[3] Respondents claim (Resp. Br. 15) that the government conceded in the district court that "at least 90 percent of the material on which the civil case will be based is grand jury material." But the implication that a reader of the complaint would learn anything about the existence or workings of the grand jury is false. First, while the government certainly did obtain a great deal of material during the grand jury period, as it told the court of appeals (U.S. C.A. Br. 44 n.43) it also obtained a great deal of important information thereafter from other sources, such as CIDs, witness interviews, and voluntary document production. Second, the complaint itself did not directly or indirectly identify anything the grand jury considered or did. The courts below thus correctly rejected the contention that the complaint reveals anything about the existence or workings of the grand jury.

[4] Moreover, a "threshold" Rule 6(e) order permitting attorneys on the prosecution team to participate in the civil case and review grand

Similarly, there is no reason to presume that defendants' discovery requests will require revelation of matters occurring before the grand jury. The government will normally be able to respond, for example, to interrogatories about its case and the evidence it will present at trial without revealing the existence or workings of a grand jury. If the government cannot meet a discovery obligation without disclosures that would require a Rule 6(e) order, the government will seek one at that time. In sum, these problems can and must be dealt with if and when they arise: they are not a reason for denying members of the prosecution team any role in the prosecution of a civil case, or for denying them continued access to materials they have previously prepared or seen.

3. Respondents appear to argue (Resp. Br. 9-11) that in any event Rule 6(e) prohibits all use of the fruits of a grand jury investigation in a related civil case without a court order. This argument, like the preceding one, implies that an attorney on the prosecution team should be barred from any role in the civil case because of his knowledge (even if not refreshed) of the grand jury proceedings.[5]

---

jury materials would not authorize government attorneys to disclose matters occurring before the grand jury to other people during discovery and trial: such actions would require additional Rule 6(e) orders. In short, respondents' proposal to require a threshold order does not even address the supposed discovery and trial problems they raise.

[5] This is exactly what ADM contends in its pending petition in No. 85-1840; indeed, ADM there appears to argue that a government attorney who has participated in a grand jury investigation should be indefinitely barred from working on any case involving the same industry. The Court of Appeals for the Eighth Circuit ruled in that case that assignment of attorneys who had participated in a grand jury proceeding to a later civil case does not constitute "disclosure" of grand jury materials to anyone. See 785 F.2d 206, 212 (1986).

But there is no evidence whatever that Congress intended to treat a grand jury investigation as if it were an unconstitutional search.[6] To the contrary, grand jury proceedings are the constitutionally mandated procedure for determining whether there is evidence to warrant charging a felony. As long as the grand jury is used only for proper purposes and there is no disclosure of matters occurring before it, there is no reason why the knowledge thus expensively gained should not be used for otherwise proper law enforcement purposes. There is no evidence that Congress intended to forbid the Department's not uncommon practice (see *Sells,* 463 U.S. at 470-472 (Burger, C.J., dissenting)) of using the same personnel in criminal and civil cases.

This Court ruled in *Sells* that Rule 6(e)(3)(A)(i) does not permit *disclosure* of grand jury materials for noncriminal use without a Rule 6(e) order. But the Court was there concerned with an interpretation of the Rule that would have permitted disclosure to any other attorney in the Department of Justice, for any otherwise proper purpose; the Court expressly declined to address "any issue concerning continued use of grand jury materials, in the civil phase of a dispute, by an attorney who himself conducted the criminal prosecution." 463 U.S. at 431 n.15. Nothing in subparagraph (A)(i), a disclosure rule, prohibits such continued use by the same attorney, and there is no evidence that Congress intended such a prohibition. None

---

[6] The only legislative history cited by respondents (Resp. Br. 10-11) as support for their position is a statement, at a House Hearing preceding the 1977 amendment of Rule 6(e), by then-Acting Deputy Attorney General Richard Thornburgh. The Court in *Sells* read Thornburgh's statement as supporting the proposition that no "*disclosure* of grand jury materials for civil use should be permitted without a court order" (463 U.S. at 440 (emphasis added; footnote omitted)). Here, however, there has not been any disclosure of grand jury materials without a court order.

of the considerations underlying grand jury secrecy[7] counsels against such use, because it does not widen the circle of knowledge of the workings of the grand jury. And, as we explained in our opening brief (U.S. Br. 35-37), the court of appeals was correct in concluding that such use will not lead to misuse of the grand jury's powers (Pet. App. 13a-15a).

4. Respondents argue (Resp. Br. 7-9, 19-20) that it is simply unfair for government attorneys to have continued access to grand jury materials in a civil case. The answer to this argument has two parts. First, we fully agree that the government may not convene or use the grand jury for the purpose of developing evidence for a civil case. But neither court below concluded, and there is not the slightest evidence, that the grand jury was so used in this case. Nor, as the court of appeals acknowledged (Pet. App. 14a), would there be a temptation to such misuse in any case where the government has extensive civil discovery powers,

---

[7] *Douglas Oil Co.* v. *Petrol Stops Northwest*, 441 U.S. 211, 218-219 (1979) (footnote omitted): "[W]e have noted several distinct interests served by safeguarding the confidentiality of grand jury proceedings. First, if preindictment proceedings were made public, many prospective witnesses would be hesitant to come forward voluntarily, knowing that those against whom they testify would be aware of that testimony. Moreover, witnesses who appeared before the grand jury would be less likely to testify fully and frankly, as they would be open to retribution as well as to inducements. There also would be the risk that those about to be indicted would flee, or would try to influence individual grand jurors to vote against indictment. Finally, by preserving the secrecy of the proceedings, we assure that persons who are accused but exonerated by the grand jury will not be held up to public ridicule." Obviously, none of these interests is affected by the prosecution team's continuing access to grand jury materials so long as they are not "made public." Respondents' suggestion (Resp. Br. 12) that witnesses undeterred by the possibility of criminal proceedings would be "less willing to testify" if members of the prosecution team can participate in and review grand jury materials in connection with a subsequent civil case is groundless.

such as it has under the Antitrust Civil Process Act (ACPA), 15 U.S.C. 1311-1314. More generally, there is little temptation to improper convening or use of a grand jury for civil purposes where only the attorneys on the prosecution team have access to the grand jury materials and the only permitted use is to refresh their recollections. And since, by hypothesis, the attorneys who conducted the grand jury are before the court in the civil case, it should not be difficult to inquire into a claim of use of the grand jury to gather evidence for the civil case and, if necessary, impose an appropriate remedy.

Second, there is no rule of fairness that requires the government, after a bona fide grand jury investigation, to start from scratch in a civil proceeding.[8] To begin with, the defendants are not starting from scratch: they have superior knowledge of their own conduct and their own records and substantial information they gained from the grand jury proceeding, including the documents they produced and information about the testimony of their own and perhaps other witnesses (who are not under any obligation of secrecy). More fundamentally, the Federal Rules of Civil Procedure seek to prevent trial by surprise, not to put all litigants on an identical footing. If the grand jury proceedings have been conducted in good

---

[8] Respondents' suggestion (Resp. Br. 20-22) that the Antitrust Division should proceed initially in all cases with discovery under the ACPA and only after those proceedings are complete convene a grand jury is not to be taken seriously. Deliberate delay of the decision whether to bring a criminal case, and civil discovery in the course of making that decision, are hardly in the interests of the defendant and would greatly prejudice the government: delay would allow critical documents to be destroyed, targets to coordinate their testimony, and criminal statutes of limitations to run. And in any case where government attorneys took the matter to a grand jury but no indictment resulted, the government attorneys would, on the theories advanced by respondents and ADM, still be unable to participate in a civil case because of their participation in the grand jury proceedings.

faith, and if appropriate discovery and a fair trial can be conducted without disclosure of matters occurring before it (or if an appropriate Rule 6(e) order can be framed should such disclosure be necessary), there is no need to waste public resources and impede the search for truth by prohibiting attorneys on the prosecution team from participating in the civil case or from having continuing access to materials already known to them.

5. ADM argues (ADM Br. 23-26) that the issue in this case is not whether government attorneys may ever use their refreshed or unrefreshed recollections of grand jury proceedings in prosecuting a civil case, but only whether they must first get permission from a district court. But apart from the fact that Rule 6(e) simply does not impose such a requirement, neither respondents nor ADM seriously contends that this threshold issue should turn on the facts of a given case. To the contrary, they contend (Resp. Br. 20-21; ADM Br. 10, 23-25) that the government should not be able to make any use of grand jury materials in a civil case where the same information is potentially available (at whatever cost after whatever delay) through civil discovery; and they contend with equal vigor (Resp. Br. 7-8; ADM Br. 16-17) that grand jury materials should not be used where the same information is *not* available to the government through civil discovery. Neither respondents nor ADM suggests any state of facts on which a Rule 6(e) order authorizing an attorney on the prosecution team to participate in the civil case and to review grand jury materials would be proper.

This threshold question—whether an attorney on the prosecution team may participate at all in a related civil case and whether he may review grand jury materials so long as he does not disclose matters occurring before the grand jury to others without a court order—should be answered by this Court. The answer does not depend on the circumstances of the case, and "particularized need" is

not a meaningful criterion in this context. Indeed, a district court order permitting members of the prosecution team to participate in a civil suit and to review grand jury materials would not resolve the supposed problem on which respondents' argument is largely based: the possible need for disclosure to new persons in the course of discovery or trial. That problem, to the extent it is real, can only be dealt with by requiring the government attorney to obtain a Rule 6(e) order before he may disclose matters occurring before the grand jury to someone else during civil discovery or trial. It is at that stage, and not before, that the district court has a meaningful role to play.

B. We demonstrated in our opening brief (U.S. Br. 38-44) that the district court acted well within its "substantial discretion" (*Douglas Oil Co.* v. *Petrol Stops Northwest*, 441 U.S. 211, 223 (1979)) when it issued a Rule 6(e) order that permitted disclosure of grand jury materials solely to other government attorneys, under a strict requirement of continuing confidentiality, and expressly limited those attorneys to using the materials for the narrow stated purpose of assisting the Antitrust Division in determining the appropriateness of bringing a False Claims Act count in this case. Compare U.S. Br. 38-44 with Resp. Br. 22-25. Respondents have not answered our arguments.

Respondents do not contend that the purpose for which the government sought disclosure was inconsistent with "the ends of justice" (*United States* v. *Socony-Vacuum Oil Co.*, 310 U.S. 150, 234 (1940)). Nor do they deny that the need to insure consistency in the enforcement of federal law is a "relevant consideration[], peculiar to [the] Government * * * that weigh[s] for * * * disclosure" (*Sells*, 463 U.S. at 445). Finally, respondents do not claim

that the use made of the disclosure here exceeded the narrow and limited scope authorized by the district court. On these points there is no dispute.

Respondents do claim (Resp. Br. 25) that the district court failed to specify in its order precisely what materials would be disclosed to the Civil Division. As we have explained (U.S. Br. 44), however, the purpose for which disclosure was sought made it impossible to specify in advance exactly what information the Civil Division would need in order to offer its expert advice on the False Claims Act.[9] Accordingly, the district court carefully limited the extent of disclosure by a different method: identifying the precise purpose for which disclosure was to be made and limiting disclosure to that purpose.

Respondents also endorse (Resp. Br. 23) the court of appeals' ruling (Pet. App. 10a) that delay and expense "can play no part" in determining whether a Rule 6(e) order should be granted, so that the government must engage in duplicative discovery in any case where it *can* do so. That ruling was erroneous: assuming *arguendo* that a Rule 6(e) order may never be issued solely in order to save time and expense, where as here the time and expense involved are obviously prohibitive in relation to the purpose for which the materials are to be used, denial of an order does not merely impose delay or cost: it defeats a valid government objective (here consultation) and serves no purpose except to hinder law enforcement.

---

[9] The purpose of the disclosure was to summarize the case, including the evidence, as precisely as possible, so as to get assistance in making an overall decision. In fact, although the grand jury record here comprised approximately 250,000 pages of documents and testimony, the Antitrust Division disclosed only a few hundred pages of fact memoranda and testimony to the Civil Division. Respondents' assertion that there was a "blanket disclosure" (Resp. Br. 25) is incorrect.

For the reasons stated above, and in our opening brief, the judgment of the court of appeals should be reversed.

Respectfully submitted.

CHARLES FRIED
Solicitor General

DECEMBER 1986

U.S. GOVERNMENT PRINTING OFFICE: 1986—181-483/40159